Supreme Court, U.S.
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No. 04 180

In The

Supreme Court of the United States

GEORGE E. BURLESON,

Petitioner,

v.

HANCOCK COUNTY SHERIFF'S DEPARTMENT CIVIL SERVICE COMMISSION, HANCOCK COUNTY SHERIFF STEVE GARBER AND FORMER HANCOCK COUNTY SHERIFF RONALD PETERSON,

Respondents.

On Petition For Writ Of Certiorari To The Appeals Court Of The State Of Mississippi

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether, a civil servant may be discharged from employment without a pre-termination hearing.

II. Whether, a civil servant may be denied a timely post-termination hearing.

III. Whether, a civil servant may be twice disciplined for the same reason.

IV. Whether, a civil servant has the right to cross-examine witnesses testifying against him.

V. Whether, a civil service commission may meet in violation of the State of Mississippi's *Open Meetings Act*.

VI. Whether, civil service commissioners, their appointed terms have long expired, may continue serving indefinitely until re-appointed or replaced, when no provision of law exists for them doing so.

VII. Whether, a civil servant's employment may be terminated based upon unnoticed charges of misconduct.

LIST OF PARTIES

Parties to the proceedings are those listed in the caption, to wit:

PETITIONER:

1. George E. Burleson

RESPONDENTS:

1. Hancock County Sheriff's Department Civil Service Commission
2. Hancock County Sheriff Steve Garber
3. Former Hancock County Sheriff Ronald Peterson

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PETITION FOR WRIT OF CERTIORARI

George E. Burleson respectfully petitions for a Writ of Certiorari to review the judgment of the Court of Appeals for the State of Mississippi, in this case.

OPINIONS BELOW

The decision (without published opinion) of the Mississippi Supreme Court (App. E, 31a) is reported at 873 So.2d 1032 (Miss. 2004).

The opinion of the Court of Appeals of the State of Mississippi (App. A, 1a) is reported at 872 So.2d 43 (Miss. 2003).

The order of the Circuit Court of Hancock County, Mississippi (App. D, 23a) Cause No. A2301-01-0160 (2002).

The Findings of Fact of the Hancock County Sheriff's Department (July 2, 2004) (App. C, 20a).

JURISDICTION

The denial of Petitioner's Writ of Certiorari to the Supreme Court of Mississippi was entered on May 6, 2004. The issues presented to and resolved by the Court of Appeals for the State of Mississippi created a conflict within the meaning of Sup. Ct. Rule 10(b) and (c).

The jurisdiction of this Court is timely invoked by Petitioner pursuant to 28 U.S.C. § 1257 and 28 U.S.C. § 2104. Petitioner invoked issues of federal due process throughout the proceedings below.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. Amend. 14, which provides in part: " . . . nor shall any state deprive any person of life, liberty, or property without due process of law. . . ."

U.S. Const. Amend. 5, which provides in part: " . . . nor shall any person . . . be deprived of life, liberty, or property, without due process of law. . . ."

Miss. Code Ann. § 25-41-1 (1975), known as the *Open Meetings Act*, reproduced in App. G, 35a, which requires public business to be conducted in public and provides in part:

> "It being essential to the fundamental philosophy of the American constitutional form of representative government and to the maintenance of a democratic society that public business be performed in an open and public manner . . . it is hereby declared to be the policy of the State of Mississippi that the formation and determination of public policy is public business and shall be conducted at open meetings. . . . "

Ch. 802, House Bill 133, Local and Private Laws for the State of Mississippi (1990), reproduced in App. H, 37a, and provides in part:

> "An act to . . . create a civil service commission for the Hancock County Sheriff's Department . . . to prescribe the procedures for removal, suspension, demotion and discharge of persons covered by the civil service system. . . . "

STATEMENT OF THE CASE

A. Proceedings and Disposition in the Lower Courts.

At every level, from the first hearing before the civil service commission to the Mississippi Supreme Court, Petitioner, supported by the efforts of his fellow officers, through his membership in the Southern States Police Benevolent Association, raised the federal questions sought to be reviewed here. At every level, the sheriff, his personally picked civil service commissioners, the Circuit Court, the Court of Appeals for the State of Mississippi and finally the Mississippi Supreme Court have ignored the controlling decisions of law by this Court.

This is a case especially warranting the Court's attention and consideration concerning the constitutionally mandated due process afforded public servants who dedicate themselves to the service of others. The Mississippi Legislature, realizing the necessity of protecting those public servants serving in law enforcement from the political will of personal whim, enacted a series of laws granting civil service protections designed to minimize the long existing good 'old boy' or as they say in the deep south 'ole boy' systems endemic in Mississippi. Local law enforcement officers have always been subjected to leadership by tyrannical dictatorship in balkanized fiefdoms of fiat where the sheriffs, chiefs of police and the mayors essentially operate under the 'do it' rule. They just do what they want to do (just do it) regardless of federally mandated due process protections afforded individual officers by their civil service status. Protections at times that are unfortunately only as good as the paper they are written due to the lack of enforcement.

Certainly, all empathize with the defendant, in the classic movie *To Kill a Mockingbird*, who dared to kiss a white woman and was put on trial for an alleged crime that really only involved going against the blatantly discriminatory dictates of the time. These discriminatory dictates have been rightfully eradicated against persons of color or other minority status. However, in Mississippi, a 'second class citizen' still exists, the law enforcement officer. While not a slave, the law enforcement officer is often treated as a public serf: One that, despite the continued efforts of federal courts, is still routinely subjected to the political whims and individual will of those politicians deftly defying and other times slyly circumventing controlling civil service rules and related regulations to personally dictate the professional lives of their officers.

Petitioner's case is still unfortunately the usual series of unfortunate events in Mississippi instead of the exception concerning the state's 'second class' citizens treated as public serfs. Few officers, when improperly disciplined or wrongfully discharged, have either the resources or the necessary support to challenge the powers to be.

Petitioner first raised the issue of the requirement of a pre-termination hearing, which he was denied, to the sheriff's civil service commission. The commission denied Petitioner's request stating in its *Finding of Fact* (App. C, 21a) (After being forced to issue one by order of the Mississippi Court of Appeals, App. B, 18a) that:

> "The Commission finds that no pre-termination hearing was required due to the danger of immediate harm to the County and the Sheriff's Department" App. B, 21a.

This Court has ruled on the issue of 'immediate harm' concerning the requirement of a pre-termination hearing and ruled that an employee allegedly constituting such a threat can be suspended pending a pre-termination hearing. But that at a minimum a pre-termination is required. See: *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985).

Petitioner raised the same issue of denial of a pre-termination hearing to the Circuit Court. Again, controlling authority was ignored. The circuit court held that:

> "The second issue for review is whether Burleson's discharge without a pre-termination and/or post-termination hearing violated his rights under the *Civil Service Rules and Regulations*. Rule 1.3 provides: 'The sheriff may, *in his discretion*, provide for a pre-termination hearing . . . and *if* a pre-termination hearing is to be held. . .' Clearly the rules do not mandate a pre-termination hearing . . . " (emphasis added by the circuit court). App. D, 26a-27a.

On appeal, Petitioner raised this issue to the Mississippi Supreme Court and the case was assigned to the Court of Appeals for the State of Mississippi. Again, controlling authority was ignored, this time by the appellate court which stated in its opinion concerning Petitioner's assertion concerning the required pre-termination hearing:

> "The sheriff's decision whether or not to grant a pre-termination hearing is discretionary." App. A, 7a.

These opinions by the Circuit Court and the Court of Appeals are directly contrary to the ruling of this Court.

Pre-termination hearings are not discretionary. *Id.* The Supreme Court of Mississippi has even extended this Court's rationale as held in the Court's *Loudermill* decision to extend to situations involving suspensions of civil servants by requiring a pre-suspension hearing. *Bowie v. City of Jackson Police Department*, 816 So.2d 1012 (Miss. 2002), citing favorably *Nichols v. City of Jackson*, 848 F. Supp. 718 (S.D. Miss. 1994) at 720.

The facts are not in dispute; Petitioner was immediately terminated without the required pre-termination hearing. As stated in this Court's opinion in *Fuentes v. Shevin*, 407 U.S. 67, 83 (1972), no amount of post-termination process can undo pre-deprivation violation once it has occurred as this is the only opportunity to invoke the discretion of the decision maker (i.e., employer) prior to the actual decision confirming termination.

After Petitioner's abrupt termination, Petitioner raised the due process issue of a timely post-termination hearing as he did not receive a hearing within twenty (20) days of his immediate termination as required by the civil service rules for the Hancock County Sheriff's Department, reproduced in App. H, 37a, which states in part:

> " . . . such employee may be terminated without a pretermination hearing as required by this section, but such employee shall be given written notice of the specific reasons for termination within twenty-four (24) hours after the termination, and shall be given an opportunity for a hearing similar to the pretermination hearing . . . within twenty (20) days after the date of termination." App. H, 43a.

The civil service commission failed to address this issue of not having a timely post-termination hearing within twenty days as required only pronouncing:

> "George E. Burleson was afforded a full opportunity at the hearing . . . " App. C, 21a.

The circuit court stated concerning this same due process issue:

> " . . . the Court finds the hearings conducted by the Commission afforded Burleson the rights and protections to which he was entitled under the Civil Service system. The Court therefore finds no merit to this issue." App. D, 27a.

The circuit court further opined:

> "There is no presumption that rights of constitutional magnitude have been infringed by the mere passage of time." App. D, 28a.

This ruling is contrary to Justice Brennan's holding in *Loudermill* that at some point the passage of time alone invokes a due process violation.

Upon review, the Court of Appeals for Mississippi stated:

> "Burleson was not informed of any action the Commission was taking until forty-eight days after his written request for a post-termination hearing. We follow the same analysis here as we did in the pre-termination hearing issue . . . While it is important to Burleson to have a quick decision . . . it is also important that a proper investigation be conducted by the Commission . . . We do not find in the record a petition for a writ ordering a hearing within twenty days of request . . . we find that Burleson failed to press the issue

> . . . even if he had, the Commission is allowed the flexibility to properly investigate the matter." App. A, 9a.

These rulings and opinions are non-sensical in that once a state grants a property interest, the state does not have the power to redefine the procedures used to protect that right as this Court made clear in its polestar decision with *Loudermill*. Controlling principles of federal law require a timely post-termination hearing and require that, if a state's procedures properly comport with federal due process, then those procures must be followed.

Petitioner timely raised his third due process issue, that he was subjected to double jeopardy (in that he was disciplined twice, first by demotion and then termination for the same reason). There is no dispute that prior to his termination, Petitioner was transferred from the Investigations Division, where he held the rank of Captain (one of the highest ranks), to the Patrol Division where he was demoted to the rank of Patrolman (the lowest rank).

In its statement of facts, the Mississippi Court of Appeals held that:

> "Burleson was employed by the Hancock County Sheriff's Department. He was assigned to the investigations department. On October 15, 1999, Sheriff Peterson informed Burleson that he was being transferred to the patrol division. The reason given for the transfer was because Sheriff Peterson had been informed that Burleson was an insurance risk . . . On March 13, 2000, Burleson received a written statement that he was being terminated from his employment because of the insurance risk he posed." App. A, 3a.

The Mississippi Court of Appeals held concerning this issue of demotion:

> " . . . The technical definition of a demotion . . . is a reduction to a class having a lower maximum rate of pay. While evidence suggests that a patrol officer does have a lower maximum rate of pay, there is no evidence that Burleson actually received a lower rate of pay. App. A, 6a. Further stating:
>
> " . . . Since Burleson failed to press the issue of his "demotion" until he was terminated, we can only assume that he was transferred and not demoted." App. A, 10a.

With this example of illogical reasoning, it is obvious how hard the appellate court was trying to find a way not to rule in Petitioner's favor on this issue. It is patently evident that Petitioner was first disciplined by transfer and demotion for being an "insurance risk" and later terminated for the very same reason. Whether he was transferred and/or demoted prior to termination is only an exercise in semantics as the result is the same. Two separate consecutive events occurred resulting in some type of discipline being imposed upon the Petitioner for the same reason, i.e., being an "insurance risk." Thus, Petitioner was subjected to double jeopardy and violation of his due process protections.

Petitioner, again from his first appearance appealing his demotion and termination, raised his fourth due process issue by challenging the civil service commission to allow him to confront the witnesses against him by the time honored and judicially grounded means of cross-examination. The commission denied him that right. The

Mississippi Court of Appeals, in considering this issue, stated:

> "We are also skeptical of Burleson's claim of not being allowed to cross-examine witnesses. The other side also was denied the opportunity to cross-examine witnesses. But the saving point of the hearing is that both sides could put on rebuttal witnesses. There is also no mention of whether Burleson could have secured the other side's witnesses as adverse witnesses. There was also no record of Burleson seeking a writ allowing him to cross examine witnesses." App. A, 11a.

This flawed decision seems to be echoing a tome from a legal scholar discoursing on trial procedures during the French Revolution. Any first year law student knows cross-examination is Hornbook law.

While Mississippi decisions erringly hold that such a fundamental right before an administrative body, although highly encouraged, is discretionary, federal courts do not. The right to confront witnesses against an accused is a hallmark of our justice system regardless of what forum. Denial of this right is a violation of due process as made clear by this Court. *Richardson v. Perales*, 402 U.S. 389 (1971).

Not only did the commission prevent Petitioner from cross-examining the witnesses against him, the commission even met in secret and heard testimony from these very same witnesses without informing the Petitioner. When Petitioner uncovered the commission's errant actions, he immediately raised the issue not only as to a gross due process violation but also as to a clear violation of Mississippi's *Open Meetings Act*. This is what the Circuit held:

> " . . . Under the *Civil Service Rules and Regulations*, 'All investigations made by the commission . . . shall be by public hearing, after reasonable written notice to the accused . . . ' The commission's minutes state that . . . attorney Gerald Gex 'explained to the Commission . . . ' and that the Commission requested former Chief Administrator Gerald Necaise 'to give a summary . . . ' However, these same individuals were subsequently called and testified in duly noticed, formal public hearings with Burleson present and represented by counsel. That there was no attempt at subterfuge by the Commission is obvious from the fact that it recorded its actions in its official minutes. Burleson has presented no evidence that the Commission's decision was based upon anything more than was established in the public hearings in his case. Therefore, the Court finds that even if the Commission erred in making its initial contact . . . , the error does not require reversal of the decision." App. D, 28a-29a.

The *Open Meetings Act*, MCA § 25-41-1 (1976), reproduced in App. G, 35a, declares that:

> " . . . it is hereby declared to be the policy of the State of Mississippi that the formation and determination of public policy is public business and shall be conducted at open meetings . . . "

As to this issue, the Mississippi Court of Appeals held:

> " . . . While Burleson argues for the nullity of any action not taken in strict compliance with the Act, the supreme court has required only substantial compliance, not a nullification of the action taken." *Shipman v. North Panola Consol. Sch. Dist.*, 641 So.2d 1106, 1116 (Miss. 1994). And further:

> " . . . While we question the investigative process of the Commission, in interviewing the parties separately, we do not think it is a violation of the Open Meetings Act because of the later hearing." App. A, 11a.

Finally, Petitioner argued on appeal, first with the circuit court and then before the Mississippi Court of Appeals, his final due process issue that the Civil Service Commission's decision was null and void because the individual commissioners were all serving years beyond their appointed terms and their terms had expired years before. Therefore, the commission lacked jurisdiction to enforce the discipline imposed consecutively by the two sheriffs. To this issue, the circuit court and the Court of Appeals ruled this issue was untimely raised. Both courts ruled in error, as an issue of 'jurisdiction' may be raised at any time, even for the first time on appeal, as this court has made clear. *Grupo Dataflux v. Atlas Global*, 124 S. Ct. 1920 (1999).

B. Facts

The core facts as determined by the circuit court and the Mississippi Court of Appeals concerning the due process issues raised here are not in dispute. Both courts held that:

1. Petitioner was not afforded a pre-termination hearing.

2. Petitioner did not receive a post-termination hearing within twenty days of his immediate termination.

3. Petitioner was first transferred and/or demoted and then terminated for the same reason.

4. The civil service commission met with witnesses in private without notification to the public or Petitioner.

5. The appointed terms of all three commissioners had long expired years ago without reappointment.

REASONS FOR GRANTING THE WRIT

I. THE ISSUES PRESENTED, OF EXCEPTIONAL PUBLIC IMPORTANCE INVOLVING FEDERALLY GRANTED DUE PROCESS RIGHTS PROTECTING CIVIL SERVANTS, HAVE BEEN DECIDED IN A WAY THAT CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT IN THAT THE COURT OF APPEALS FOR THE STATE OF MISSISSIPPI DENIED PETITIONER BASIC FUNDAMENTAL DUE PROCESS INCLUDING HOLDING THAT A PRE-TERMINATION HEARING IS 'DISCRETIONARY' AND A TIMELY POST-TERMINATION NOT REQUIRED.

The errant actions of civil service commissions, by allowing critical due process violations, continues to grossly retard the proper actions and professional growth of law enforcement in Mississippi. For how can local law enforcement officers be secure enough in their careers to do the right thing, when faced for example with a crime committed by an elected official or prominent citizen or standing up to corrupt practices or other illegal acts, regardless of the potential political repercussions and thus 'career ending' consequences, unless protected by enforceable civil service rules. Rules, by their very nature,

designed to allow law enforcement to independently operate without fear of such political and personal repercussions.

The answer is simple, they cannot. By ignoring civil service rules and denying even the minimum due process required, the commissions and the courts harm us all, not only the Petitioner. Petitioner's case is a classic example of what routinely occurs throughout the state when an elected law enforcement official and his self-appointed civil service commissioners denies a public servant even the minimal due process required and an improper termination abruptly ends a twenty-year career dedicated to public service.

The issues presented are of exceptional importance to law enforcement officers, and all public servants, concerning the enforceability of due process protections constitutionally afforded civil servants.

II. THE COURT OF APPEALS FOR THE STATE OF MISSISSIPPI HAS DECIDED IMPORTANT QUESTIONS OF FEDERALLY GRANTED DUE PROCESS RIGHTS INVOLVING CIVIL SERVICE IN A WAY THAT CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT.

The Court Of Appeals Erred In Affirming That A Pre-Termination Hearing Is Discretionary.

The Mississippi Court of Appeals incorrectly applied the three factors in *Mathews v. Eldridge*, 424 U.S. 319 (1976) to determine the amount of due process due Captain Burleson prior to his termination. This Court previously addressed the application of the *Mathews* factors in an analogous circumstance. Indeed, the Court of Appeals

cites this controlling authority but then inexplicably fails to apply it. This Court has held that a public employee/civil servant must have a pre-termination hearing prior to discharge. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985). Once a state grants certain property interests to a citizen, federal due process protections, under the Fifth and Fourteenth Amendments to the U.S. Constitution, prevent that property from being taken without the proper due process of law. *Goss v. Lopez*, 419 U.S. 565 (1975). Therefore, as Captain Burleson did not have the constitutionally mandated pre-termination hearing, his termination violated the federal due process protections afforded him.

The Court of Appeals' opinion states that the sheriff's decision whether or not to grant a pre-termination hearing is "discretionary." App. A, 7a. This is clearly incorrect according to *Loudermill* and this Court has previously stated what minimum due process is required, as to the minimum pre-termination due process:

> "Where a governmental employer chooses to postpone the opportunity of a non-probationary employee to secure a full-evidentiary hearing until after dismissal, risk reducing procedures must be accorded. These must include, prior to termination, written notice of the reasons for termination and an effective opportunity to rebut those reasons. Effective rebuttal must give the employee the right to respond in writing to the charges made and to respond orally before the official charged with the responsibility of making the termination decision." *Id.*

See also: *Little v. City of Jackson*, 375 So.2d 1031 (Miss. 1979) as cited in *Eidt v. City of Natchez*, 382 So.2d

1093, 1094 (Miss. 1980) for the Mississippi Supreme Court correctly analyzing the due process required a civil servant concerning termination.

In fact, the Mississippi Court of Appeals has previously held that not only is *Loudermill* to be followed concerning the required pre-termination due process but also ruled that the minimum due process requirements for pre-termination in *Loudermill* also be followed for pre-suspension due process. *Bowie v. City of Jackson Police Department*, No. 2000-CC-0124-COA (Jan. 22, 2002). Now, the Court of Appeals is stating that the decision " . . . whether or not to grant a pre-termination hearing is discretionary." This is directly contrary to the appellate court's recent holding in *Bowie* and this Court's pronouncements in *Loudermill*.

The United States District Court, S.D. Mississippi, and the Fifth Circuit Court of Appeals (analyzing the required due process required concerning termination of a civil servant in Mississippi), directly rejected the Mississippi Court of Appeals' recent rationale in holding that Petitioner's pre-termination due process is "discretionary." Minimum pre-termination (and according to the Mississippi Appellate Court in *Bowie* pre-suspension due process also) is required and not discretionary and the requirements have previously been clearly set forth by these courts. In *Little*, the Mississippi Supreme Court adopted the Fifth Circuit's requirements (as set forth in *Loudermill*) of the minimum pre-termination procedures required by due process under the Fourteenth Amendment as set forth in *Thurston v. Dekle*, 531 F.2d 1264 (1976). See also: *Nichols v. City of Jackson*, 848 F. Supp. 718 (Miss. S.D. 1994).

There is no argument that these procedures were not followed, as Petitioner did not receive a pre-termination hearing, and thus the Mississippi Court of Appeals plainly erred in ruling that a pre-termination hearing is now "discretionary" and that Petitioner was provided the minimum due process required (by only receiving written notification of termination and the actions he could take if he disagreed) when clearly he was not. App. A, 7a-8a.

The Court Of Appeals Erred In Affirming That A Timely Post-Termination Hearing Is Discretionary.

In *Little*, the Mississippi Supreme Court, affirmatively citing the Fifth Circuit in *Thurston*, clearly stated that an opportunity for an evidentiary hearing within twenty (20) days of termination must be given if required by the civil service rules and regulations. Which is exactly the case here, as the civil service rules require such a hearing within twenty days. App. H, 43a. Contrary to the Court of Appeals, there is no discretion to delay or withhold this time sensitive post-termination due process requirement. App. A, 8a-9a. Further, the Mississippi Supreme Court has ruled that a civil service commission is bound by its own legislatively enacted rules. *City of Meridian v. Johnson*, 593 So.2d 35 (Miss. 1992); citing *Bulloch v. City of Pascagoula*, 577 So.2d 1234 (Miss. 1991). The appellate court's "flexibility to properly investigate" rationale for delay erringly allows total disregard of required due process protections and total disregard for the commission's own controlling rules and regulations. App. A, 8a-9a. As a post-termination hearing must be held within twenty (20) days and Petitioner was not granted a hearing until over one hundred twenty (120) days (ten times the allowable time

frame) after his timely appeal to the commission, the Court of Appeals decision is clearly in error. App. A, 4a.

Further, the Mississippi Court of Appeals cites no controlling or even supporting authority for the pronouncement that as Petitioner "failed to press the issue," by petitioning for a "writ", he somehow abandoned valuable procedural protections. App. 9a. The court cannot, as none exist. Petitioner timely perfected his appeal and requested a hearing and it was the commission's duty to then afford him one comporting with its own rules and regulations, existing state law and federal due process. The commission failed to do so. This Court has held that failure to provide a timely post-termination hearing is a violation of federally protected due process. *Gilbert v. Homar*, 570 U.S. 924 (1997).

The Court Of Appeals Erred In Rejecting The Right To Cross-Examine And Confront Adverse Witnesses.

The Court of Appeals 'skepticism' concerning cross-examination is factually and legally unfounded. App. A, 11a. The rationale that, because the other side was also denied the opportunity to cross-exam, Burleson's rights were not violated is non-sensical. The right to challenge an adverse witness is a hallmark protection of the accused, not the accuser. The right to put on rebuttal witnesses or call adverse witnesses as a "saving point" has been expressly rejected. As this Court has held, denial of the right to confront witnesses by cross-examination in administrative proceedings is a denial of due process. *Richardson v. Perales*, 402 U.S. 389 (1971); *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Cuellar v. Texas Emp. Com.*, 825 F.2d 930 (5th Cir. 1987).

The Court Of Appeals Erred In Affirming That Petitioner Could Be Disciplined Twice For The Same Reason.

The Mississippi Court of Appeals cites the principle that a civil servant should not be punished twice for the same reason, as first pronounced by the Mississippi Supreme Court in *Ladnier v. City of Biloxi*, 749 So.2d 139, 153 (Miss. 1999). However, the Court of Appeals disagrees that Petitioner was disciplined twice for the same reason. The Court's rationale is that, as Petitioner failed to "press the issue" of his demotion until he was terminated, the Court can only "assume" that he was "transferred" and not demoted. App. A, 9a-10a. The Court does not discuss how this assumption is drawn from a failure to "press the issue." The Court of Appeals does not discuss how this leap of logic makes a "transfer" a non-disciplinary event. The Court of Appeals does not cite any controlling or guiding authority. Regardless of whether or not Petitioner properly "pressed the issue", the record is replete with testimony regarding two consecutive 'disciplinary events' stemming from the same incident (*All* witnesses testified that he was in fact disciplined by "demotion"). The circuit court in its order discussed in detail the events leading up to Petitioner's termination:

> "According to former Sheriff Peterson, Burleson's actions in the Benvenutti and Poole cases prompted him to transfer Burleson from investigations to patrol in November 1999. Sheriff Garber testified he decided to terminate Burleson based on consideration of the insurance problems, potential liability and lawsuits against the county. . . . " App. D, 25a.

Whether or not Petitioner properly appealed his first discipline (of whatever nature) is of no moment. There is no requirement that the first disciplinary event must be challenged in order to challenge a second subsequent disciplinary event resulting from the same incident or same nucleus of operative fact as the first. The hallmark of our judicial system is that a person cannot be punished twice for the same act. Even when pleading guilty (thereby not contesting either the charge or the punishment), a person has the absolute right not to be punished again for that which he already pled guilty and received punishment, as jeopardy has firmly and irrevocably attached.

The civil service commission in its Findings of Fact determined that although Petitioner's transfer from the investigations division to the patrol division was not a demotion, the commission did determine that it was a disciplinary event, stating:

> "The transfer of George E. Burleson from Investigations to Patrol by Sheriff Peterson was not a demotion, as it did not involve a change in pay, grade or benefits. Further, that George E. Burleson failed to appeal same within ten (10) days of the *disciplinary* action." (emphasis added) App. C, 20a.

There is no issue that Petitioner properly appealed his subsequent termination and timely asserted his termination was improper, for a number of reasons, including that he had been previously disciplined for the same reason (i.e., being an "insurance risk"). App. A, 2a-4a.

The record is clear. Contrary to the Mississippi Court of Appeals incorrect rationale, nothing needs to be "assumed." App. A, 10a. The commission determined that his transfer was a "disciplinary action" and the record is

replete with uncontradicted testimony from all parties involved and every witness regarding the discipline by former Sheriff Ronnie Peterson and subsequent discipline by Sheriff Steve Garber with all parties testifying that Petitioner was first "demoted" and then "terminated" for the same reason. All witnesses testified that both "disciplinary actions" (demotion and termination) were taken against Petitioner because of his alleged involvement in the same two claims/lawsuits against the sheriff's department. Regardless of what "term" the Court uses to define the two consecutive disciplinary events (the Court of Appeals refers to a "transfer") (App. A, 10a) the record is clear that all parties testified that "discipline" occurred twice for the same alleged reasons. Consecutive discipline is improper and once disciplined (by whatever means), Petitioner was constitutionally protected from further discipline of whatever nature concerning the same incident. Thus, his subsequent termination was improper. As clearly stated by the Mississippi Supreme Court in a case of first impression:

> "If a civil servant was disciplined once for certain misconduct, it follows that good cause would not then exist to sustain the employee's later discharge." *Ladnier v. City of Biloxi*, 749 So.2d 139, 153 (Miss. 1999).

The Court Of Appeals Erred In Ruling That The Commission Did Not Violate The *Open Meetings Act* And Did Not Meet In Violation Of The Commission's Own Rules.

The rule is clear, the Mississippi Supreme Court has stated that an administrative body, such as a civil service commission, is bound by its legislatively enacted rules and

regulations. *Bullock v. Miss. Emp. Security Com'n*, 697 So.2d 1147 (Miss. 1997). The Court of Appeals therefore properly questioned the investigative process of the commission when meeting in secret with adverse witnesses. App. A, 11a. The Court, however, erred in relying on a previous decision of the Mississippi Supreme Court holding that only substantial compliance is required. *Shipman v. North Panola Consol. Sch. Dist.*, 641 So.2d 1106, 1116 (Miss. 1994). The Mississippi Supreme Court's opinion in *Shipman* can be distinguished. In *Shipman*, this Court found "substantial compliance" in response to technical violations of the *Open Meetings Act*. Here, there was zero compliance until Petitioner forced compliance. In fact, the commission admitted (at the first so-called "hearing" that Petitioner and counsel were notified of and attended) that the commission had *never* complied with the Act. Therefore, by the commission's own admissions (that the normal course of business was to meet privately with each party separately and then reach a decision, etc.), the commission had repeatedly violated controlling state statutory law without ever having even substantial compliance. The Mississippi Supreme Court has consistently held that a commission's failure to follow legislatively mandated statutory rules and regulations, as well as, its own rules nullifies the commission's actions. See: *Grant v. City of Columbus*, 812 So.2d 976 (Miss. 2002) citing *City of Jackson Police Department v. Ruddick*, 234 So.2d 566 (Miss. 1971); *City of Meridian v. Johnson*, 593 So.2d 35 (Miss. 1992); *Watson v. City of Pascagoula*, 577 So.2d 1234 (Miss. 1991); *City of Laurel v. Samuels*, 469 So.2d 530 (Miss. 1985); *Banks v. City of Greenwood*, 404 So.2d 1038 (Miss. 1981); *Eidt v. City of Natchez*, 382 So.2d 1093 (Miss. 1980).

The commission's rules are clear and unequivocal; "All investigations . . . shall be by public hearing, after reasonable written notice to the accused . . . " App. H, 44a. The term "shall" leaves no room for interpretation by the commission according to the Mississippi Supreme Court. *Chandler v. City of Jackson Civil Service Commission*, 687 So.2d 142 (Miss. 1997). As there was no substantial compliance with the act or with the commission's own rules and regulations, the actions of the commission concerning Burleson are nullified and cannot be affirmed.

Meeting in secret with accusing and adverse witnesses smacks of Orwellian big brother procedures and star chamber justice.

The Court Of Appeals Erred In Affirming Petition's Discharge Based On Unnoticed Charges Of Misconduct.

Only when the Court of Appeals ordered the commission to issue a Finding of Fact, was the petitioner advised that the commission had relied upon unnoticed and unsubstantiated charges (nothing exists in the record) in finding that Burleson showed "inattention to duty, incompetence, and discourteous treatment of the public . . . " App. C, 21a. As Petitioner was never advised or even aware of any "charges" against him, except the unexplained statement by the Sheriff that he was an "insurance risk", App. A, 3a, the commission's (and now the Mississippi Court of Appeals') reliance on these findings to support his termination is patently improper. Discharge, without notice or opportunity to respond to charges of misconduct, has been expressly rejected as a gross due process violation and re-instatement required. *Hill v. City of Pontotoc*, 993 F.2d 422 (5th Cir. 1993).

Considering the far reaching consequences of not receiving notice and a fair opportunity to rebut, this Court recently held concerning the issues of due process concerning detained citizens classified as enemy-combatants that:

> "We therefore hold that a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decision maker." *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004) citing generally *Cleveland Bd. of Ed. v. Loudermill*, 470 U.S. 532, 542 (1985). Also stating:
>
> "An essential principle of due process is that a deprivation life, liberty, or property 'be preceded by notice and opportunity for hearing appropriate to the nature of the case.'" *Hamdi* at 2673 quoting *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 313 (1950).

It is clear, based on the decisions of this Court, that Petitioner, as a citizen who dedicated twenty years of his professional life to the service of others, deserves as much due process as a fellow citizen captured during war while fighting for the enemy. It is equally clear that Petitioner never received notice of the charges of misconduct against him nor an opportunity to respond.

The Court Of Appeals Erred In Ruling That The Issue Of The Commission's Serving Beyond Their Appointed Terms Was Not Properly Before The Circuit Court.

While new issues may not be raised for the first time on appeal, the exception is the issue of jurisdiction. The

lack of authority of a judicial or quasi-judicial body may be raised at any time. As this is an issue of jurisdiction, it was therefore properly raised. *Extension of Boundaries of Itta Bena*, 788 So. 2d 747 (Miss. 2001). The Court of Appeals mistakenly relies upon a decision from 1892 (involving a holdover elected official), which, is in no way analogous with the circumstances before this Court. As the actions were taken by appointed commissions whose certain terms had long expired without any existing statutory authority to holdover, a quorum never existed and their actions concerning Petitioner were invalid. *Simpson v. City of Gulfport*, 121 So.2d 409 (Miss. 1960).

CONCLUSION

For the foregoing reasons, that Petitioner was denied a pre-termination hearing, a timely post-termination hearing, was disciplined twice for the same reason, was denied the right of cross-examination of witnesses against him, was not present during secret meetings by the commission with these witnesses, was not informed of the unnoticed charges that the commission, relied upon to affirm his termination and because the commissioners were all serving years beyond the expiration of their appointed terms without reappointment, Petitioner respectfully urges the Honorable Supreme Court of the United States to grant his petition and issue a Writ of Certiorari to review

the judgment of the Court of Appeals for the State of Mississippi.

Respectfully submitted,

George E. Burleson
By and through his attorney
and on behalf of the
Southern States Police
Benevolent Association

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August 3, 2004

APPENDIX A

IN THE COURT OF APPEALS
OF THE STATE OF MISSISSIPPI

NO. 2002-CC-00411-COA

GEORGE E. BURLESON **APPELLANT**

v.

HANCOCK COUNTY SHERIFF'S DEPARTMENT CIVIL SERVICE COMMISSION, HANCOCK COUNTY SHERIFF STEVE GARBER AND FORMER HANCOCK COUNTY SHERIFF RONALD PETERSON **APPELLEES**

DATE OF TRIAL COURT JUDGMENT:
2/21/2002

TRIAL JUDGE:
HON. ROBERT H. WALKER

COURT FROM WHICH APPEALED:
HANCOCK COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:
JAMES BAILEY HALLIDAY

ATTORNEY FOR APPELLEE:
ALBERT LIONEL NECAISE

NATURE OF THE CASE:
CIVIL – OTHER

TRIAL COURT DISPOSITION:
AFFIRMED COMMISSION FINDING APPROVING TERMINATION OF CIVIL SERVANT.

DISPOSITION:
AFFIRMED – 11/18/2003

MOTION FOR REHEARING FILED:

CERTIORARI FILED:

MANDATE ISSUED:

EN BANC

MYERS, J., FOR THE COURT:

¶1. The Hancock County Circuit Court upheld the Hancock County Sheriff's Department's Civil Service Commission's (Commission) decision to uphold George Burleson's termination as a deputy. It is from that decision that Burleson appeals asserting:[1]

1. HE WAS DEMOTED IN VIOLATION OF THE CIVIL SERVICE RULES AND REGULATIONS;

2. HE WAS DENIED DUE PROCESS BY HIS DISCHARGE WITHOUT A PRE-TERMINATION HEARING;

3. HE WAS NOT GIVEN A POST-TERMINATION HEARING WITHIN TWENTY DAYS OF HIS REQUEST;

4. HE WAS SUBJECTED TO DOUBLE JEOPARDY;

5. HE WAS DENIED DUE PROCESS BECAUSE OF THE LENGTH OF TIME FOR THE COMMISSION'S DECISION;

6. THE COMMISSION HELD MEETINGS IN VIOLATION OF ITS RULES AND THE OPEN MEETINGS ACT;

---

[1] We have restructured the issues to facilitate a better understanding of the nature of this appeal. While Burleson asserted twenty issues, many of the issues were repetitive in nature and are capable of being discussed within other issues.

7. THE JUDGMENT OF THE COMMISSION WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE;

8. THE JUDGMENT OF THE COMMISSION WAS ARBITRARY AND CAPRICIOUS AND BEYOND THEIR AUTHORITY;

9. THE COMMISSION FAILED TO SET FORTH ANY FINDINGS OF FACTS OR CONCLUSIONS OF LAW.

STATEMENT OF FACTS

¶2. Burleson was employed by the Hancock County Sheriff's Department. He was assigned to the investigation department. On October 15, 1999, Sheriff Peterson informed Burleson that Burleson was being transferred to the patrol division. The reason given for the transfer was because Sheriff Peterson had been informed that Burleson was an insurance risk. The risk stemmed from two separate lawsuits filed against the sheriff's department based upon actions of Burleson. The insurance company had threatened not to renew the insurance policy covering the sheriff's department. On November 1, Burleson was transferred to patrol. He filed no objection. Although Burleson never complained of the transfer until his termination, he now argues that this was a demotion and not a transfer.

¶3. On March 13, 2000, Burleson received a written statement that he was being terminated from his employment because of the insurance risk he posed. The letter also included his right to appeal and his entitlement to accumulated compensatory and vacation time. The letter was from Sheriff Garber. Sheriff Garber entered office in January of 2000 after defeating Sheriff Peterson in the

election. On March 15, 2000, Burleson requested a hearing. Burleson filed a written complaint with the Commission.

¶4. On May 2, the Commission acknowledged it was investigating the matter. The Commission conducted an investigation and hearing. On August 24, 2000, Burleson met with the Commission. It was at this time, Burleson discovered that the Commission had already met with the other parties.

¶5. In late August of 2000, a hearing was held, but was continued as the attorney that was to represent Sheriff Garber was called as a witness, resulting in Sheriff Garber's having to retain other legal counsel. The hearing was continued several times and was reconvened on January 17, 2001. Burleson asserts that cross-examination of the opposition was not allowed.

¶6. The Commission returned a decision on March 26, 2001, approving the termination of Burleson. Burleson appealed to the Hancock County Circuit Court on April 6, 2001. The circuit court judge affirmed the decision on February 22, 2002. Burleson perfected his appeal.

LEGAL ANALYSIS

¶7. The standard of review this Court is to follow in appeals from a circuit court's ruling on a case from the Civil Service Commission is set out in section 21-31-23 of the Mississippi Code Annotated. It states in part:

> However, such hearing shall be confined to the determination of whether the judgment or order of removal, discharge, demotion, suspension or combination thereof made by the commission,

> was or was not made in good faith for cause, and no appeal to such court shall be taken except upon such ground or grounds.

Miss. Code Ann. § 21-31-23 (Rev.2000).

¶8. The Mississippi Supreme Court has held that "intertwined with this question [of good faith] is whether or not there was substantial evidence before the Civil Service Commission to support its order and whether it is arbitrary, unreasonable, confiscatory, and capricious." *City of Meridian v. Hill,* 447 So.2d 641, 643 (Miss.1984). The burden is on the appellant. *Lanier v. City of Biloxi,* 749 So.2d 139, 154 (¶59) (Miss. 1999).

1. WAS HE DEMOTED IN VIOLATION OF THE CIVIL SERVICE RULES AND REGULATIONS?

¶9. The Civil Service Rules and Regulations Rule 1.3 states in part:

> No person who has been permanently appointed or inducted into civil service under the provisions of this act . . . shall be removed, suspended, demoted, or discharged, or any combination thereof, except for cause, and only upon the written accusation of the sheriff or any citizen or taxpayer, a written statement of which accusation, in general terms, shall be served upon the accused and a duplicate filed with the commission.

¶10. The rule is based on part of Mississippi Code Annotated section 21-31-23. Burleson did not make his transfer an issue until March 15, 2000, when he requested a hearing regarding his termination and "demotion." The

Civil Service Rules and Regulations Rule 1.3 allows for only ten days from date of incident to request a hearing.

¶11. Burleson argues that because the Commission did not object to his raising the issue, it was properly before the Commission. The Commission issued no ruling or statement regarding the reassignment. Because Burleson failed to properly raise the issue within the required time, the Commission did not have to consider the issue.

¶12. Although the circuit court did decide that the issue was not properly before the Commission, the circuit court also discussed whether Burleson was actually demoted or reassigned. The technical definition of a demotion according to the Civil Service Rules and Regulations Rule 3.2.11 is a reduction to a class having a lower maximum rate of pay. While evidence suggests that a patrol officer does have a lower maximum rate of pay, there is no evidence that Burleson actually received a lower rate of pay.

2. WAS HE DENIED DUE PROCESS BY HIS DISCHARGE WITHOUT A PRE-TERMINATION HEARING?

¶13. The Civil Service Rules and Regulations Rule 1.3 states in part:

> In the absence of extraordinary circumstances or situations, before any such employee may be removed or discharged, he shall be given written notice of the intended termination, which notice shall state the reasons for termination and inform the employee that he has the right to respond in writing to the reasons given for termination within a reasonable time and respond orally before the sheriff. The sheriff may in his discretion, provide for a pre-termination

> hearing and examination of witnesses, and if a hearing is to be held, the notice to the employee shall also set the time and place of such hearing.

¶14. The sheriff's decision whether or not to grant a pre-termination hearing is discretionary. Burleson argues that federal law requires a pre-termination hearing for civil employees. In *Cleveland Board of Education v. Loudermill,* the court ruled that public employees must be given a pre-termination hearing. *Loudermill*, 470 U.S. 532, 542 (1985). Although the court did not require that a *full evidentiary hearing* be held prior to discharge, it did conclude that some type of informal hearing was called for. Specifically, the court found that a public employee "is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story" prior to termination. *Loudermill,* 470 U.S. at 546.

¶15. The Fourteenth Amendment forbids states from depriving an individual of life, liberty or property without due process. Due process requirements are not the same in every situation. Rather, the amount of process required varies according to the circumstances of the deprivation. In *Mathews v. Eldridge,* 424 U.S. 319, 335 (1976), the three factors normally weighed in determining the required amount of process are the importance of the individual interests involved, the value of specific procedural safeguards to that interest and the government interest in administrative efficiency. *Id.*

¶16. When a procedural due process claim is raised in a case, it must be evaluated using a two step process. *Nichols v. City of Jackson,* 848 F. Supp. 718, 720 (S.D. Miss.1994). "The first step requires the court to decide whether a protected life, liberty or property interest exists.

The second step is a court determination of what process is required in the situation." *Id.*

¶17. The first step of the analysis is easily dealt with. The plaintiff's property interest in his employment was created by Mississippi Code Annotated Sections 21-31-21 and 21-31-23, which provide that civil service employees cannot be discharged except for cause. As for the second step, Burleson was given the minimum due process required by an analysis of the *Mathews* factors: the written notification of termination and the actions he could take if he disagreed with the termination. We do not have to discuss the extraordinary circumstance or situation exception, as there was no due process violation.

3. HE WAS NOT GIVEN A POST-TERMINATION HEARING WITHIN TWENTY DAYS OF HIS REQUEST.

¶18. The Civil Service Rules and Regulations Rule 1.3 states in part:

> Where there are extraordinary circumstances or situations which require the immediate discharge or removal of an employee such employee may be terminated without a pre-termination hearing as required by this section, but such employee shall be given written notice of the specific reasons for termination within 24 hours after the termination, and shall be given an opportunity for a hearing similar to the pre-termination hearing provided in this section within 20 days after the date of termination.

¶19. Burleson was not informed of any action the Commission was taking until forty-eight days after his written request for a post-termination hearing.

¶20. We follow the same analysis here as we did in the pre-termination hearing issue. Burleson was entitled to a certain amount of due process as a civil servant. The question is what was the minimum amount of due process which was required. The three factors, (1) the importance of the individual interests involved, (2) the value of specific procedural safeguards to that interest and (3) the government interest in administrative efficiency, must be weighed. *Mathews,* 424 U.S. at 335. While it was important to Burleson to have a quick decision by the Commission, it is also important that a proper investigation be conducted by the Commission.

¶21. It also does not appear that Burleson pressed the issue for a hearing within twenty days of his termination. We do not find in the record a petition for a writ ordering a hearing within the twenty days of request. As such, we find that Burleson failed to press the issue of having a hearing within twenty days of his request, and even if he had, the Commission is allowed the flexibility to properly investigate the matter.

4. WAS HE SUBJECTED TO DOUBLE JEOPARDY?

¶22. Burleson argues that the transfer in November of 1999 was a demotion rather than a transfer. He argues that a demotion is a reduction from one pay class to another pay class with a lower maximum rate of pay.

¶23. Burleson argues that his "demotion" was for the same reason as his termination, thus good cause was lacking for the termination. We agree with the principle that a civil servant should not be punished twice for the same incident, but we disagree that this was the case here. Since Burleson failed to press the issue of his "demotion"

until he was terminated, we can only assume that he was transferred and not demoted. Since Burleson was working for the sheriff's department, he was subject to a reclassification of his duties.

5. WAS HE DENIED DUE PROCESS BECAUSE OF THE LENGTH OF TIME FOR THE COMMISSION'S DECISION?

¶24. Burleson argues that because it took over a year for the Commission to reach a decision, his due process rights were violated. Some of the delays were agreed to by Burleson's attorney. As stated earlier, the Commission is afforded the opportunity to conduct a thorough investigation and make a well-informed decision. We do not think that the delays were a violation of due process.

6. DID THE COMMISSION HOLD MEETINGS IN VIOLATION OF ITS RULES AND THE OPEN MEETINGS ACT?

¶25. When Burleson met with the Commission for the first time in August of 2000, he was informed that the Commission had already met with Sheriff Garber, Ronald Cuevas, and Gerald Gex. Burleson was not given notice of the meetings. When Burleson and thee [sic] other parties met for the hearing, Burleson was not given an opportunity to cross-examine the opposition.

¶26. The Civil Service Rules and Regulations Rule 1.3 states in part:

> All investigations made by the commission pursuant to the provisions of this section shall be by public hearing, after which reasonable written notice to the accused of the time and place of

> such hearing, at which the accused shall be afforded an opportunity of appearing in person and by counsel, and presenting defense.

¶27. Burleson also argues that the Commission violated the Open Meetings Act by meeting with the parties separately. The Open Meetings Act declares a policy that public business be performed in an open and public manner. While Burleson argues for the nullity of any action not taken in strict compliance with the Act, the supreme court has required only substantial compliance, not a nullification of the action taken. *Shipman v. North Panola Consol. Sch. Dist.*, 641 So.2d 1106, 1116 (Miss. 1994).

¶28. The Commission investigated Burleson's termination by first meeting with the parties individually. The Commission also allowed a hearing in which all parties were present and testimony was presented by both sides. While we question the investigative process of the Commission in interviewing the parties separately, we do not think that it is a violation of the Open Meetings Act because of the later hearing.

¶29. We are also skeptical of Burleson's claim of not being allowed to cross-examine witnesses. The other side also was denied the opportunity to cross-examine witnesses. But the saving point of the hearing is that both sides could put on rebuttal witnesses. There is also no mention of whether Burleson could have secured the other side's witnesses as adverse witnesses. There was also no record of Burleson seeking a writ allowing him to cross-examine witnesses.

7. WAS THE JUDGMENT OF THE COMMISSION NOT SUPPORTED BY SUBSTANTIAL EVIDENCE?

¶30. Burleson argues that the Commission lacked substantial evidence to uphold his termination. Civil Service Rules and Regulation 15.1.1 provides in part that a civil servant may be removed for any "omission or commission tending to injure the public services." Although Burleson claims that he was not a named defendant in one of the two lawsuits against the sheriff's department, testimony showed that he was the reason the sheriff's department was sued. The sheriff's department was advised that the suits could lead to a loss of insurance or an increased premium and deductible.

¶31. The decision of a commission must be based on substantial evidence. *Board of Law Enforcement Officers Standards and Training v. Butler,* 672 So.2d 1196, 1199 (Miss. 1996). Substantial evidence means evidence which is substantial, affording a substantial basis of fact from which the fact in issue can be reasonably inferred. *Id.* There was substantial evidence presented to the Commission to support its decision. A loss of insurance for the sheriff's department is an injury to public services.

8. WAS THE JUDGMENT OF THE COMMISSION ARBITRARY AND CAPRICIOUS AND BEYOND THEIR AUTHORITY?

¶32. As stated above, the Commission had substantial evidence to uphold Burleson's termination. The insurance carrier had threatened to not renew the policy if something was not done about Burleson. Burleson also argues that the decision of the Commission was arbitrary and capricious. The standard is:

> [T]he orders of the Commission are final unless (1) beyond the power which it could constitutionally exercise; or (2) beyond its statutory power; or (3) based upon a mistake of law. But questions of fact may be involved in the determination of questions of law, so that an order, regular on its face, may be set aside if it appears that (4) the rate is so low as to be confiscatory and in violation of the constitutional prohibition against taking property without due process of law; or (5) if the Commission acted so arbitrarily and unjustly as to fix rates contrary to evidence, or without evidence to support it; or (6) if the authority therein involved has been exercised in such an unreasonable manner as to cause it to be within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of the power.

Dixie Greyhound Lines v. Miss. Pub. Serv. Comm'n, 190 Miss. 704, 715, 200 So. 579, 580 (1941) quoting *I.C.C. v. Union P.R.R. Company,* 222 U.S. 541, 547 (1912).

¶33. The sheriff acted in the best interest of the sheriff's department and the county. The Commission was correct in upholding the termination.

¶34. Burleson also argues that the decision of the Commission is null because the commissioners were serving beyond their appointed terms. The argument was not presented to the Commission. It was presented for the first time to the circuit court on appeal and the circuit court ruled it untimely. *Tbuart v. Johnston,* 656 So.2d 318, 321 (Miss.1995). We agree. Although Burleson is precluded from raising this issue on appeal, public officials can serve after the expiration of their term until they are replaced.

Andrews v. State, 69 Miss. 740, 746, 13 So. 853, 854 (1892).

9. DID THE COMMISSION FAIL TO SET FORTH ANY FINDINGS OF FACTS OR CONCLUSIONS OF LAW?

¶35. Burleson also argues that the Commission's order failed to set forth any findings of fact or conclusions of law. The order stated only that Burleson was terminated for "good cause" and not for any political or religious reasons. We entered an order mandating the Commission to prepare proper findings of fact and conclusions of law.

¶36. The Commission complied and entered an amended order that found as fact that Burleson's conduct in his official capacity, more particularly in two incidents that ultimately led to suits being brought against the sheriff's department, constituted inattention to duty and incompetence. The Commission further found as fact that the continued employment of Burleson by the department raised a substantial risk that the department would be unable to renew its existing liability insurance coverage, which would have the potential to substantially hamper the department in the performance of its duties. We conclude that there was substantial evidence in the record to support these findings of fact. We also find that the findings of fact were sufficient, as a matter of law, to constitute grounds for Burleson's discharge. This supplemental order therefore renders Burleson's original contention moot.

CONCLUSION

¶37. While the Commission may have made some mistakes, it is important to remember that the Commission is

an administrative law agency composed of persons not always well versed in the law. The Commission had to make a hard decision, whether to sacrifice insurance coverage for the sheriff's department thereby putting all citizens of that county at risk or to uphold the termination of Burleson. The Commission may have made some mistakes, but its decision followed a lengthy investigation and information gathering process. The circuit court upheld the Commission's decision. We uphold the circuit court's decision.

¶38. THE JUDGMENT OF THE CIRCUIT COURT OF HANCOCK COUNTY IS AFFIRMED. COSTS ARE ASSESSED TO THE APPELLANT.

BRIDGES, THOMAS, LEE, AND CHANDLER, JJ., CONCUR. KING, P.J., AND IRVING, J., CONCUR IN RESULT ONLY. SOUTHWICK, P.J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY McMILLIN, C.J., AND GRIFFIS, J.

SOUTHWICK, P.J., DISSENTING:

¶39. With respect for the majority, I find that more process was due to Burleson before he was terminated. The Court points out that the United States Supreme Court has held that a public employee, protected in his job by the limitation on dismissal only for good cause, must have a pre-termination opportunity to be heard. *Cleveland Bd. of Educ. v. Loudermill,* 470 U.S. 532, 542 (1985). Though citing that case, the majority then does not apply it.

¶40. Once a life, liberty or property interest is identified, then any deprivation of that interest must be through such procedures as are needed to provide fairness in the context of the deprivation. It is certainly true that the process that

is constitutionally required depends on various considerations. *Mathews v. Eldridge,* 424 U.S. 319, 335 (1976). The problem, here, though, is that the context has already been addressed by the Supreme Court. The weighing of factors required by *Eldridge* in the context of for-cause termination from public employment was performed by the Supreme Court. *Loudermill,* 470 U.S. at 543-45. The conclusion was that a pretermination hearing was needed:

> The governmental interest in immediate termination does not outweigh these interests. As we shall explain, affording the employee an opportunity to respond prior to termination would impose neither a significant administrative burden nor intolerable delays. Furthermore, the employer shares the employee's interest in avoiding disruption and erroneous decisions; and until the matter is settled, the employer would continue to receive the benefit of the employee's labors. It is preferable to keep a qualified employee on than to train a new one. A governmental employer also has an interest in keeping citizens usefully employed rather than taking the possibly erroneous and counterproductive step of forcing its employees onto the welfare rolls. Finally, in those situations where the employer perceives a significant hazard in keeping the employee on the job, it can avoid the problem by suspending with pay.

Loudermill, 470 U.S. 532, 544-45. The Court followed these observations with the conclusion "that the pretermination 'hearing,' though necessary, need not be elaborate. We have pointed out that '[t]he formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings.'" *Id.* at 545.

¶41. Since Burleson was not given an opportunity to be heard prior to his termination, I would reverse and remand.

McMILLIN, C.J., AND GRIFFIS, J., JOIN THIS SEPARATE WRITTEN OPINION.

APPENDIX B

Serial: 105170

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

No. 2002-CC-00411-COA

GEORGE E. BURLESON ***Appellant***

v.

HANCOCK COUNTY SHERIFF'S DEPARTMENT CIVIL SERVICE COMMISSION, HANCOCK COUNTY SHERIFF STEVE GARBER AND FORMER HANCOCK COUNTY SHERIFF RONALD PETERSON ***Appellee***

ORDER

(Filed Jun 04, 2003)

This matter came before the Court on appeal and the Court on its own motion finds that it is necessary to remand the case to the Hancock County Sheriff's Department Civil Service Commission for thirty days for the limited purpose of requiring the Commission to make written findings of fact in accordance with Miss. Code Ann. § 21-31-23 (Rev. 2001). The statute provides that "[t]he findings of the commission shall be certified in writing to the appointing power. . . . " *See Bowie v. City of Jackson Police Department*, 816 So. 2d 1012 (¶ 21) (Miss. Ct. App. 2002), citing *City of Jackson v. Froshour*, 530 So.2d 1348, 1355 (Miss. 1988) (holding that the "Commission is under a duty to set forth with sufficient clarity and specificity the reason it is upholding the action taken by the city. . . . "). The Court finds that no specific findings of

fact were made by the Commission and the [sic] such findings are necessary for the appellate review of this case.

THEREFORE IT IS ORDERED that on the Court's own motion the case is remanded to the Hancock County Sheriff's Department Civil Service Commission for the limited purpose of requiring the Commission to make written findings of fact pursuant to Miss. Code Ann. § 21-31-23 (Rev. 2001) and to certify these findings to the Court within thirty (30) days from the date of the entry of this order.

SO ORDERED, this the 3rd day of June, 2003.

/s/ William H. Myers
WILLIAM H. MYERS,
JUDGE

APPENDIX C

STATE OF MISSISSIPPI
COUNTY OF HANCOCK

HANCOCK COUNTY SHERIFF'S DEPARTMENT
CIVIL SERVICE COMMISSION

IN RE: GEORGE E. BURLESON

FINDINGS OF FACT

Pursuant to the Order and Mandate of the Court of Appeals entered in Cause No. 2002-CC-00411-COA, an Appeal by George E. Burleson, Appellant, Hancock County Sheriff's Department Civil Service Commission et al, Appelees [sic] for the limited purpose of the Commission making Findings of Fact, the Commission, by and through its duly appointed Commissioners, William A. Tate, Honorable Ann Williamson and Raquel Lafontaine, does hereby certify the following facts, to-wit:

I.

The transfer of George E. Burleson from Investigations to Patrol by Sheriff Peterson was not a demotion, as it did not involve a change in pay, grade or benefits. Further, that George E. Burleson failed to appeal same within ten (10) days of the disciplinary action.

II.

The actions by George E. Burleson in the Poole and Benvenutti cases (two citizens arrested by George E. Burleson) and resulting lawsuits against Hancock County and the Sheriff's Department, placed the Sheriff's Department and the County in danger of immediate injury to

the County by losing its insurance if George E. Burleson were to continue in his employment, as testified by both Sheriff Steve Garber and County Attorney, Honorable Gerald Gex.

III.

The Commission finds that no pre-termination hearing was required due to the danger of immediate harm to the County and the Sheriff's Department.

IV.

The Commission finds that George E. Burleson showed inattention to duty, incompetence, and discourteous treatment of the public, as well. Further, the written notice of termination by Sheriff Steve Garber on March 13, 2000, included the specific reason for his termination.

V.

George E. Burleson was afforded a full opportunity at the hearing and that his legal counsel vigorously defended the charges. A full review of all documents and testimony was made by the Commission.

VI.

Both former Sheriff Peterson and former Chief Administrator Gerald Necaise testified that George E. Burleson was provided all training and counseling regarding the requirements of his job, and that George E. Burleson was provided a copy of the Civil Service Rules (signed

for in 1990), Department policies and procedures and his job description, as well.

VII.

The Commission finds that the termination of George E. Burleson was made in good faith and for cause, was supported by substantial evidence and was not made for political or religious reasons (Note: George E. Burleson testified that he campaigned for Sheriff Steve Garber).

SO ENTERED on this the 2nd day of July, 2003.

/s/ William A. Tate
WILLIAM A. TATE
Commission Chairman

/s/ Ann Arras Williamson
HONORABLE
ANN WILLIAMSON
Commission Vice-Chairman

/s/ R. LaFontaine
RAQUEL LAFONTAINE
Commissioner

APPENDIX D

IN THE CIRCUIT COURT OF
HANCOCK COUNTY, MISSISSIPPI

GEORGE E. BURLESON — APPELLANT

VERSUS — NO. A2301-01-0160

HANCOCK COUNTY SHERIFF'S DEPARTMENT CIVIL SERVICE COMMISSION, HANCOCK COUNTY SHERIFF STEVE GARBER AND FORMER HANCOCK COUNTY SHERIFF RONALD PETERSON — APPELLEES

ORDER

(Filed Feb. 22, 2002)

George E. Burleson appeals from the termination of his employment with the Hancock County Sheriff's Department [HCSD] by the County's Civil Service Commission [Commission]. On appeal Burleson presents ten issues which he contends require reversal of the Commission's decision. After carefully reviewing the record and the briefs and authorities submitted by the parties, hearing oral argument, and studying applicable law, the Court finds as follows:

George Burleson began working with HCSD in June 1980 as a dispatcher and jailer, and over the years advanced to ranks of sergeant, staff sergeant, lieutenant and captain. After attaining the rank of captain, he served as an investigator until October 15, 1999, when then Sheriff

Ronald Peterson[1] advised him that effective November 1, 1999, Burleson was reassigned to the patrol division. Burleson testified that in March 2000, Sheriff Steve Garber terminated his employment, telling him he was an insurance risk.

The record contains a March 13, 2000 letter from Sheriff Garber advising Burleson that after discussing the matter with the Attorney for the Hancock County Board of Supervisors, he "had no other choice but to advise [Burleson] that effective March 13, 2000, [Burleson's] services will no longer [sic] needed by the Sheriff's Office. "The letter informs Burleson of his right to appeal this decision to the Civil Service Commission and of his entitlement to his accumulated comp time and vacation, and concludes:

> Due to the number of cases now pending in which you are involved and the cases the office has been involved over the years, there is great concern as to the availability of insurance for my office.

The record evidence is undisputed that at the time Sheriff Garber discharged Burleson, individuals named Benvenutti and Poole had lawsuits pending against Hancock County and its Sheriff because of Burleson's involvement in having these citizens arrested.[2] It is further undisputed that Burleson's actions and the resulting lawsuits were adversely affecting the ability of the

---

[1] In his bid for re-election in 1999, Sheriff Peterson was defeated by present Sheriff Steve Garber.

[2] As soon as he learned of the arrests, Sheriff Peterson released Poole from custody in Hancock County and, secured the release of Benvenutti through Florida authorities where she was arrested because Burleson had put her name into the National Crime Information Center nationwide computer.

HCSD to get and/or maintain liability insurance. The insurer was considering non-renewal of the HCSD policy due to excessive exposure/multiple claims involving Burleson, or excluding Burleson from the policy's coverage, and the insurer informed Sheriff Garber that if it renewed the policy it would be with an accelerated deductible or significant premium increase. According to former Sheriff Peterson, Burleson's actions in the Benvenutti and Poole cases prompted him to transfer Burleson from investigations to patrol in November 1999. Sheriff Garber testified he decided to terminate Burleson based on consideration of the insurance problems, potential liability and lawsuits against the county and the best interest of the county. On March 15, 2000, Burleson filed a request for hearing before the Civil Service Commission regarding his termination, as well as the "demotion" by Sheriff Peterson which had occurred six months earlier.

The *Civil Service Rules and Regulations for Hancock County Sheriff's Department* provide that judicial review of Commission decisions is "confined to the determination of whether the . . . discharge . . . was or was not made in good faith for cause, and no appeal to such court shall be taken except upon such ground or grounds." Civil Service hearings, like other administrative proceedings, are reviewed on a substantial evidence standard. *Ladnier v. City of Biloxi*, 749 So.2d 139, 147 (Miss. 1999)]; *City of Jackson v. Froshour*, 530 So.2d 1348, 1355 (Miss. 1988). Review is upon the record made before the Commission, and the Court is not to disturb a decision which is supported by substantial evidence. It is with that standard in mind that the Court addresses Burleson's complaints.

Burleson's first complaint is that his November 1999 "demotion" and transfer from investigations to patrol violated the *Civil Service Rules and Regulations for*

Hancock County Sheriff's Department. The record before this Court contains no timely written request by Burleson for investigation by the Civil Service Commission of the alleged demotion. Rule 1.3 of the *Civil Service Rules and Regulations* requires that a request for Commission investigation of a demotion be filed with the Commission within 10 days from the time of such disciplinary action. See also, Ch. 802, Local and Private Laws 1990, Section 11 [written demand for Civil Service Commission investigation must be filed within 10 days of action of which complaint is made]. The only request for Commission investigation in the record is the one dated March 15, 2000, which calls into question whether this Court has jurisdiction to review the alleged demotion at all. However, in the event that this issue be deemed properly before the Court, the Court finds as a matter of law that Burleson's 1999 transfer from investigations to patrol was not a demotion as defined under the *Civil Service Rules and Regulations.* A demotion is "a reduction to a class having a lower maximum rate of pay." Rule 3.2.11. No evidence contradicts the testimony of former Sheriff Peterson that the transfer *did not* affect Burleson's pay, that it was "just an alternative to termination." There is no merit to this issue. Since there was no demotion, there is likewise no merit to Burleson's third issue [whether demotion and firing for the same reason violated Burleson's due process rights] and his ninth issue on appeal [whether the Commission had the power to discharge him for the same reason for which he was previously demoted].

The second issue for review is whether Burleson's discharge without a pre-termination and/or post-termination hearing violated his rights under the *Civil Service Rules and Regulations.* Rule 1.3 provides: "The

sheriff may, *in his discretion*, provide for a pretermination hearing . . . and *if* a pretermination hearing is to be held. . . . " Clearly, the rules do not mandate a pretermination hearing, and had there been one, Burleson could not have denied that the insurer's reluctance to renew the HCSD policy because of the pending lawsuits. In addition, as to the right to a post-termination hearing, the Court finds the hearings conducted by the Commission afforded Burleson the rights and protections to which he was entitled under the Civil Service system. The Court therefore finds no merit to this issue.

Burleson's fourth issue is whether the Commission's "waiting over a year to reach a decision" violated his due process rights. Neither the *Civil Service Rules and Regulations* nor their statutory source compel a decision by the Commission within a specified time. The record establishes that on August 24, 2000, Burleson's case was set for hearing before the Commission. On August 31, 2000, the Commission received the testimony of the attorney for Hancock County Board of Supervisors Gerald Gex and a copy of the Poole lawsuit. Sheriff Garber was present, however he asked that he be allowed to get an attorney before proceeding further, and the Commission continued the case. Burleson's counsel did not object; he responded "that's very fair. . . . " The hearing was rescheduled from November and December dates, and ultimately concluded on January 17, 2001. The record reflects no objection by Burleson to the Commission's resetting the matter. On January 17, 2001, the Commission heard the testimony of former Sheriff Peterson, Chief Administrator Ronnie Cuevas, Sheriff Steve Garber, Gerald Necaise, and George Burleson, and received into evidence two volumes of exhibits. At the conclusion of the hearing, the Commission

requested that the parties submit proposed findings of fact and conclusions of law. Counsel for Sheriff Garber and Burleson complied with this request on January 31, 2001 and February 9, 2001, respectively. On March 26, 2001, the Commission rendered its decision. The record supports a finding of good cause for the initial continuance of the hearing in August 2000, and shows no objection by Burleson to any continuance or rescheduling of the hearings. There is no presumption that rights of constitutional magnitude have been infringed by the mere passage of time. Burleson bears the burden on appeal of showing, by record evidence, that such a violation occurred. The Court finds Burleson has failed to meet his burden on this issue.

The fifth and sixth issues Burleson presents for review are so closely intertwined that the [sic] will address them as one. Burleson complains, respectively, that the Commission violated the *Civil Service Rules and Regulations* by "conducting investigations, outside the forum of a public hearing and without notification to Captain Burleson" and that the Commission violated the Open Meetings Act by "meeting in private, without notice to the public or Deputy Burleson. . . . " Under the *Civil Service Rules and Regulations*, "All investigations made by the commission . . . shall be by public hearing, after reasonable written notice to the accused of the time and place of such hearing." The Commission's minutes state that on May 2, 2000, attorney Gerald Gex "explained to the Commission liability cases pertaining to George Burleson . . . ," and that the Commission requested former Chief Administrator Gerald Necaise "to give a summary as to George Burleson's actions leading to his lateral transfer and dismissal." However, these same individuals were subsequently called and testified in duly noticed, formal public hearings with

Burleson present and represented by counsel. That there was no attempt at subterfuge by the Commission is obvious from the fact that it recorded its actions in its official minutes. Burleson has presented no evidence that the Commission's decision was based upon anything more than was established in the public hearings in his case. Therefore, the Court finds that even if the Commission erred in making its initial contact with Gex and Necaise as it did, the error does not require reversal of the decision.

The seventh issue for review is whether substantial evidence supports the Commission's decision that "Burleson, because of two pending lawsuits allegedly involving him, was an 'insurance risk' creating 'extraordinary circumstances' requiring his immediate discharge." In light of the undeniable record evidence of the two lawsuits, both of which arose out of Burleson's conduct, and the undisputed evidence that the insurer was threatening non-renewal of the HCSD policy due to the excessive liability exposure resulting from Burleson's conduct, the Court finds substantial record evidence supports the Commission's decision.

Burleson's eighth issue for review challenges the Commission's decision as arbitrary and capricious in his eighth assignment of error. The Commission's Conduct and decision in this case do not meet the definition of arbitrary and capricious as stated in *McGowan v. Mississippi State Oil & Gas Bd.*, 604 So.2d 312, 322 (Miss. 1992):

> "Arbitrary" means fixed or done capriciously or at pleasure. An act is arbitrary when it is done without adequately determining principle; not done according to reason or judgment, but depending upon the will alone, – absolute in power, tyrannical, despotic, non-rational, – implying

> either a lack of understanding of or a disregard for the fundamental nature of things.
>
> "Capricious" means freakish, fickle, or arbitrary. An act is capricious when it is done without reason, in a whimsical manner, implying either a lack of understanding of or a disregard for the surrounding facts and settled controlling principles.

In his tenth and final issue on appeal, Burleson challenges the Commission's order on grounds that the Commissioners were serving beyond their statutorily limited appointed terms of office. The Court finds this issue is not the proper subject of judicial review as there is no evidence in the record made below that the issue was presented to the Commission. It is therefore,

ORDERED AND ADJUDGED, the decision of the Hancock County Civil Service Commission is affirmed, this the 21st day of FEB., 2002.

/s/ Robert H. Walker
ROBERT H. WALKER
CIRCUIT JUDGE

APPENDIX E

Serial: 113250

IN THE SUPREME COURT OF MISSISSIPPI

No. 2002-CT-00411-SCT

GEORGE E. BURLESON

v.

HANCOCK COUNTY SHERIFF'S DEPARTMENT CIVIL SERVICE COMMISSION, HANCOCK COUNTY SHERIFF STEVE GARBER AND FORMER HANCOCK COUNTY SHERIFF RONALD PETERSON

ORDER

(Filed May 6, 2004)

This matter came before the Court on the petition for writ of certiorari filed by George E. Burleson. After consideration, the Court finds that the petition should be denied.

IT IS THEREFORE ORDERED that the petition for writ of certiorari is hereby denied.

SO ORDERED, this the 30 day of April, 2004.

/s/ James W. Smith, Jr.
JAMES W. SMITH, JR.,
CHIEF JUSTICE
FOR THE COURT

TO DENY: SMITH, C.J., WALLER AND COBB, P.JJ., EASLEY, CARLSON, GRAVES, DICKINSON AND RANDOLPH, JJ.

NOT PARTICIPATING: DIAZ, J.

APPENDIX F

U.S. Constitution: Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Constitution: Fourteenth Amendment

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of

the male inhabitants of such state, *being twenty-one years of age*, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizen's shall bear to the whole number of male citizens twenty-one years of age in such state.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

APPENDIX G

Miss. Code Ann. § **25-41-1** (2004)

§ 25-41-1. Legislative declaration

It being essential to the fundamental philosophy of the American constitutional form of representative government and to the maintenance of a democratic society that public business be performed in an open and public manner, and that citizens be advised of and be aware of the performance of public officials and the deliberations and decisions that go into the making of public policy, it is hereby declared to be the policy of the State of Mississippi that the formation and determination of public policy is public business and shall be conducted at open meetings except as otherwise provided herein.

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28 USCS § 1257 (2004)

§ 1257. State courts; certiorari

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

(b) For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

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28 USCS § 2104 (2004)

§ 2104. Reviews of State court decisions

A review by the Supreme Court of a judgment or decree of a State court shall be conducted in the same manner and under the same regulations, and shall have the same effect, as if the judgment or decree reviewed had been rendered in a court of the United States.

APPENDIX H

CHAPTER NO. 802
HOUSE BILL NUMBER 133

AN ACT TO AUTHORIZE THE BOARD OF SUPERVISORS OF HANCOCK COUNTY TO CREATE A CIVIL SERVICE COMMISSION FOR THE HANCOCK COUNTY SHERIFF'S DEPARTMENT; TO PROVIDE FOR THE APPOINTMENT OF MEMBERS OF THE COMMISSION; TO SPECIFY THE DUTIES OF THE COMMISSION; TO SPECIFY THE PERSONS COVERED BY THE CIVIL SERVICE SYSTEM; TO PRESCRIBE THE PROCEDURE FOR APPOINTMENTS AND LAYOFFS OF PERSONS COVERED BY THE CIVIL SERVICE SYSTEM; TO PRESCRIBE THE PROCEDURE FOR REMOVAL, SUSPENSION, DEMOTION AND DISCHARGE OF PERSONS COVERED BY THE CIVIL SERVICE SYSTEM; AND FOR RELATED PURPOSES.

Be it enacted by the Legislature of the State of Mississippi:

SECTION 1. The Board of Supervisors of Hancock County is authorized to create by ordinance a civil service commission for the Hancock County Sheriff's Department.

SECTION 2. (1) The members of the civil service commission shall be appointed by the Sheriff of Hancock County, with a majority of the Board of Supervisors of Hancock County voting therefor; shall be three (3) in number; and shall be paid a sum not to exceed One Hundred Dollars ($100.00) per month to compensate them for their services. No person shall be appointed a member of such commission who is not a citizen of the United States and Hancock County, and who has not lived in Hancock County for at least five (5) years immediately preceding such appointment. Terms of office for each members [sic]

shall be for six (6) years, except that the first three (3) members shall be appointed for staggered terms as follows: One (1) shall serve a period of two (2) years, one (1) shall serve a period of four (4) years and one (1) shall serve a period of six (6) years.

(2) Any member of the commission may be removed from office for incompetency, incompatability [sic], dereliction of duty, or other good cause, by the Board of Supervisors of Hancock County. However, no member shall be removed until charges have been preferred in writing and a full hearing had before the board of supervisors. Any member being so removed shall have the right of appeal to the circuit court any time within thirty (30) days thereafter, and may demand a jury trial. Such trial shall be confined to the determination of whether the order of removal made by the board of supervisors was or was not made in good faith and for cause.

(3) Two (2) members shall constitute a quorum and the votes of any two (2) members shall constitute a majority and be sufficient for the decision of all matters and transactions.

SECTION 3. (1) Immediately after the appointment of the civil service commission, the commission shall organize by electing one (1) of its members chairman. The commission shall hold regular meetings at least once each month, and such additional meetings as may be required for the proper discharge of its duties.

(2) The commission shall appoint a secretary and a board of examiners, which board shall consist of the sheriff and two (2) members appointed by the commission, all of whom shall serve without compensation. The secretary shall keep the records and preserve all reports made to the

commission, and also a record of all examinations held under the direction of the board of examiners, and perform such other duties as the commission may prescribe. The members of the board and the secretary are subject to suspension and discharge in the same manner as the commissioners.

SECTION 4. It shall be the duty of the civil service commission to make suitable rules and regulations not inconsistent with the provisions of this act. Such rules and regulations shall provide in detail the manner of conducting examinations, appointments, promotions, transfers, reinstatements, demotions, suspensions and discharges, and may also provide for any other matter connected with the general subject of personal administration which may be considered desirable to further carry out the general purposes of this act. It shall have the power to conduct investigations, and make reports on all matters touching the enforcement and effect of the provisions of this act and the rules and regulations prescribed hereunder. The commission shall have the power to investigate all complaints, which must be reduced to writing, and to subpoena witnesses, administer oaths and conduct hearings.

SECTION 5. The Board of Supervisors of Hancock County shall provide the commission with suitable and convenient rooms and accommodations, and shall cause the same to be furnished, heated and lighted and supplied with all office supplies and equipment necessary to carry on the business of the commission, and shall provide such clerical assistance as may be necessary, all of which is to be commensurate with the number of persons in the Hancock County Sheriff's Department coming within the purview of this act. The failure upon the part of the board

of supervisors to do so shall be considered a violation of this section and shall be punishable as such.

SECTION 6. The provisions of this act shall include all full-time paid employees of the Hancock County Sheriff's Department except the sheriff and chief deputy. All appointments to and promotions in the sheriff's department shall be made solely on merit, efficiency and fitness, which may be ascertained by open competitive examination and impartial investigation. No person shall be reinstated in, or transferred, suspended, or discharged from any place, position or employment contrary to the provisions of this act. All incumbents and future appointees shall be subject to civil service.

SECTION 7. Any applicant for any position in the Hancock County Sheriff's Department which is under civil service must be a citizen of the United States and an elector of Hancock County, and must meet only such bona fide occupational residency requirements as may be determined by the civil service commission.

SECTION 8. For the benefit of the public service and to prevent delay, injury or interruption therein by reason of the enactment of this act, all persons holding a position in the Hancock County Sheriff's Department, except the sheriff and chief deputy, who have served continuously in such positions for a period of at least the preceding six (6) months are eligible for permanent appointment under civil service to the offices, positions, or employments which they then hold, respectively, without examination or other act on their part, and not on probation, and every such person is automatically adopted and inducted permanently into civil service, into such office, place, position or employment which such person then holds as completely and

effectually to all intents and purposes as if such person had been permanently appointed thereto under civil service after examination and investigation. However, those persons who have previously left their positions to participate in the Armed Forces of the United States shall have preference in reemployment and enjoy the rights and privileges of this act as if their services had not been terminated.

SECTION 9. The civil service commission shall keep a list of all members of the Hancock County Sheriff's Department, and formulate methods of determining the relative qualifications of persons seeking employment in the sheriff's department, and give preference to those having the best qualifications. The commission shall provide that persons laid off because of curtailment of expenditures, reduction in force, and all like causes, shall be the last persons, including probationers, that have been appointed to the sheriff's department, until such reductions necessary shall have been accomplished. However, if the sheriff's department again is increased in numbers, those suspended shall be reinstated before any new appointments shall be made.

SECTION 10. The tenure of everyone holding an office, place, position or employment under the provisions of this act shall be only during good behavior. Any such person may be removed or discharged, suspended without pay, demoted or reduced in rank, or deprived of vacation privileges or other special privileges, or any combination thereof, for any of the following reasons:

Incompetency, inefficiency, or inattention of duty; dishonesty, intemperance, immoral conduct, insubordination, discourteous treatment of the public or a fellow

employee, or any other act of omission or commission tending to injure the public service.

SECTION 11. No person who has been permanently appointed or inducted into civil service under the provisions of this act, except for such persons as may be employed to fill a vacancy caused by the absence of an employee of the sheriff's department while in service as a member of the Armed Forces of the United States, shall be removed, suspended, demoted or discharged, or any combination thereof, except for cause, and only upon the written accusation of the sheriff or any citizen or taxpayer, a written statement of which accusation, in general terms, shall be served upon the accused, and a duplicate filed with the commission.

In the absence of extraordinary circumstances or situations, before any such employee may be removed or discharged, he shall be given written notice of the intended termination, which notice shall state the reasons for termination and inform the employee that he has the right to respond in writing to the reasons given for termination within a reasonable time and respond orally before the sheriff. The sheriff may, in his discretion, provide for a pretermination hearing and examination of witnesses, and if a hearing is to be held, the notice to the employee shall also set the time and place of such hearing. A duplicate of such notice shall be filed with the commission. After the employee has responded or has failed to respond within a reasonable time, the sheriff shall determine the appropriate disciplinary action, and shall notify the employee of his decision in writing at the earliest practicable date.

Where there are extraordinary circumstances or situations which require the immediate discharge or

removal of an employee, such employee may be terminated without a pretermination hearing as required by this section, but such employee shall be given written notice of the specific reasons for termination within twenty-four (24) hours after the termination, and shall be given an opportunity for a hearing similar to the pretermination hearing provided in this section within twenty (20) days after the date of termination. For the purposes of this section, extraordinary situations or circumstances include, but are not limited to, circumstances where retention of the employee would result in damage to property of the county or the sheriff's department, would be detrimental to the interest of the county government or the sheriff's department, or would result in injury to the employee, to a fellow employee or to the general public.

Any person so removed, suspended, demoted, discharged or combination thereof may, within ten (10) days from the time of such disciplinary action, file with the commission a written demand for an investigation, whereupon the commission shall conduct such investigation. The investigation shall be confined to the determination of the question of whether such disciplinary action was or was not made for political or religious reasons and was or was not made in good faith for cause. After such investigation the commission may, if in its estimation the evidence is conclusive, affirm the disciplinary action, or if it shall find that the disciplinary action was made for political or religious reasons, or was not made in good faith for cause, shall order the immediate reinstatement or reemployment of such person in the office, place, position, or employment from which such person was removed, suspended, demoted, discharged or combination thereof, which reinstatement shall, if the commission so provides in its

discretion, be retroactive, and entitle such person to pay or compensation from the time of such disciplinary action. The commission upon such investigation may, in lieu of affirming the disciplinary action, modify the order of removal, suspension, demotion, discharge or combination thereof by directing a suspension without pay for a given period and subsequent restoration of duty, or by directing a demotion in classification, grade or pay, or by any combination thereof. The findings of the commission shall be certified in writing to the sheriff, and shall be forthwith enforced by the sheriff.

All investigations made by the commission pursuant to the provisions of this section shall be by public hearing, after reasonable written notice to the accused of the time and place of such hearing, at which hearing the accused shall be afforded an opportunity of appearing in person and by counsel, and presenting his defense. The findings of the commission shall be conclusive and binding unless either the accused or the sheriff, within thirty (30) days from the date of the entry of such judgment or order on the minutes of the commission and notification to the accused and the sheriff appeals to the Circuit Court of Hancock County. Any appeal of the judgment or order of the commission shall not act as a supersedeas of such judgment or order, but the judgment or order shall remain in effect pending a final determination of the matter on appeal. Such appeal shall be taken by serving the commission and the appellee, within thirty (30) days after the entry of such judgment or order, a written notice of appeal stating the grounds thereof, and demanding that a certified transcript of the record and of all papers on file in the office of the commission affecting or relating to such judgment or order

be filed by the commission with such court. The commission shall, within thirty (30) days after the filing of such notice, make, certify and file such transcript with such court. The circuit court shall thereupon proceed to hear and determine such appeal. However, such hearing shall be confined to the determination of whether the judgment or order of removal, discharge, demotion, suspension or combination thereof made by the commission was or was not made in good faith for cause, and no appeal to such court shall be taken except upon such ground or grounds.

SECTION 12. The fixing of the rate of compensation of every employee in the Hancock County Sheriff's Department shall remain vested with the Sheriff of Hancock County, and nothing contained in this act shall infringe upon the power and authority of the sheriff to so fix the rate of compensation.

SECTION 13. No person holding any office, place, position or employment in the Hancock County Sheriff's Department which is subject to civil service is under any obligation to contribute to any political fund or to render any political service to any person or party whatsoever, and no person shall be removed, reduced in grade or salary, or otherwise prejudiced for refusing so to do. No public officer, whether elected or appointed, shall discharge, promote, demote or in any manner change the official rank, employment or compensation of any person in the sheriff's department under civil service, or promise or threaten so to do, for giving or withholding or neglecting to make any contribution of money or service or any other valuable thing for any political purpose.

If any person holding any office, place, position or employment in the sheriff's department which is subject

to civil service actively participate in political activity in any primary or election in Hancock County, it shall be deemed cause for removal

SECTION 14. This act shall take effect and be in force from and after its passage.

Approved: March 20, 1990

APPENDIX I

HANCOCK COUNTY SHERIFF'S DEPARTMENT CIVIL SERVICE COMMISSION

[SEAL]

P.O. Box 262 – Bay St. Louis, MS 39520
(601) 467-5101

Personal & Confidential

March 26, 2001

Honorable James Bailey Halliday
Attorney at Law
P.O. Box 549
Gulfport, MS 39502

RE: George E. Burleson
Appeal of Demotion and Discharge

Dear Mr. Halliday:

After reviewing all testimony and documentary evidence in the above referenced cause, the Civil Service Commission of the Hancock County Sheriff's Office does hereby uphold the termination of George E. Burleson and finds that said termination was not made for political or religious reasons but was made in good faith for cause.

Your client has a right to appeal this decision to the Hancock County Circuit Court, but said appeal must be filed within 30 days of the date hereof.

Sincerely,

Civil Service Commission
for Hancock County Sheriff's
Office

/s/ David A. Garcia
David A. Garcia, President

/s/ William A. Tate
William A. Tate,
Vice President

/s/ Ann Arras Williamson
Ann Arras Williamson,
Commissioner

cc: Mr. George E. Burleson
Hon. W. Ross Capps/Albert Necaise
Sheriff Steve Garber

bcc: Civil Service File

APPENDIX J

Hancock County Sheriff's Department
H. Steve Garber – Sheriff

[LOGO]

122 1/2 Court Street
Bay Saint Louis, MS 39520
(228) 467-5101

March 13, 2000

Mr. George Burleson

Dear Mr. Burleson,

I have been in contact with the Attorney for the Hancock County Board of Supervisors, and as a result of our discussions I have no other choice but to advise you that effective March 13, 2000 your services will no longer be needed by the Sheriff's Office.

You have the right to appeal my decision to the Civil Service Commission and on your termination, you will be entitled to your accumulated comp time and vacation time.

Due to the number of cases now pending in which you are involved and the cases the office has been involved over the years, there is great concern as to the availability of insurance for my office.

Respectfully yours,

/s/ Steve Garber
Steve Garber
Sheriff

SG\tg